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No. _____

In The

Supreme Court of the United States

October Term, 1993

CITY OF SEATTLE, ET AL.,

Petitioners,

v.

PAUL A. BASCOMB, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit violated the requirements of this Court's decisions, in particular *Hunter v. Bryant*, 112 S.Ct. 534 (1991), when it denied petitioners' claims of qualified immunity by substituting its own judgment of the facts and circumstances faced by petitioner Lisoski, rather than asking the question required by this Court: could a reasonable police officer have believed deadly force to be lawful under the circumstances known to petitioner Lisoski?

PARTIES TO THE PROCEEDING

Petitioners Robert Lisoski and Patrick Fitzsimons were Defendants and Appellants below. The City of Seattle was a Defendant below. Respondents Paul A. Bascomb, as personal representative of the estate of Erdman Bascomb, and Frank and Flora Bascomb, were Plaintiffs and Appellees below.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Robert Lisoski and Patrick Fitzsimons petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit").

OPINIONS BELOW

The unpublished memorandum opinion of the Ninth Circuit is included at petitioners' Appendix "A," App. 1. The unpublished order of the United States District Court

for the Western District of Washington (the "District Court") is included in Appendix "F," App. 9.

JURISDICTION

The Judgment of the Ninth Circuit was entered on October 28, 1993. (Appendix "H," App. 49.) The Ninth Circuit's Order denying appellants' petition for rehearing with suggestion for rehearing *en banc* was filed on January 19, 1994. (Appendix "G," App. 47.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Statement of Facts.

This case involves whether petitioners are entitled to qualified immunity from suit in a situation requiring the use of deadly force by petitioner Lisoski, a Seattle police officer. Petitioner Fitzsimons is the Seattle police chief.

On February 17, 1988, members of the Seattle police department anti-crime team ("ACT") served a legally valid search warrant for narcotics on a residential apartment in Seattle, Washington. The ACT had previously served a search warrant on the residence, found six or seven people present, and found and seized narcotics. (ER 33; ER 108.)[1]

Petitioner Lisoski was the first officer to enter the apartment, which was dark. After stepping into the apartment, he saw a person on the couch in the living room. In his testimony before the inquest jury, petitioner Lisoski stated that the "room was dark" and "[i]t was like looking through a tunnel." (ER 30.) He continued:

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[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit.

> "I noticed movement over here. As I looked I saw a leg move. I looked up to the upper body and I saw an arm come out straight like this with an object in the hand and a body twisted, raised up like this. (Indicating.) . . . My thought at that time was I was going to be shot. I knew I was going to be shot. I stepped back and raised my revolver and I raised it and I fired."

(*Id.*) Petitioner Lisoski then testified that although he could not see the object pointed at him, he thought it was a gun:

> "Because the way the arm came out so rapidly, and the hand. It was pointed directly at me. And then the body raising up. Like somebody was going – like I was going to be shot. . . . I knew it was aimed directly at me. . . . "

(ER 30-31.)[2] The bullet fired from petitioner Lisoski's revolver struck and killed Erdman Bascomb. (Appendix "F," App. 10; ER 55, inquest findings 1-3; ER 145-146, Aff. of Dr. Fligner.)

The Seattle District Court conducted a coroner's inquest into the incident. Respondents' counsel participated. (ER 53.) The inquest jury unanimously found that (1) Mr. Bascomb pointed an object at petitioner Lisoski; (2) petitioner Lisoski believed that the object was a gun; (3) petitioner Lisoski's belief was "reasonable in light of the facts, circumstances and conditions as they appeared to [petitioner Lisoski] at the time"; (4) petitioner Lisoski reasonably believed that "Erdman Bascomb intended to inflict death or great bodily harm on [petitioner] Lisoski

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[2] This testimony is fundamentally the same as the statement given by Petitioner Lisoski two days after the incident. (*See* ER 109-110.)

or the other officers in his company and believed that there was imminent danger of such harm being accomplished"; and (5) "the force used by [petitioner] Lisoski [was] necessary." (ER 55-57.)

2. Proceedings in the District Court.

The decedent's personal representative, and others, brought an action under 42 U.S.C. § 1983 against the City of Seattle and petitioners Lisoski and Fitzsimons.[3] Respondents contended, *inter alia,* that petitioner Lisoski's actions in apprehending Mr. Bascomb by the use of deadly force unreasonably violated Mr. Bascomb's Fourth Amendment rights under *Tennessee v. Garner,* 471 U.S. 1 (1985). Petitioners Lisoski and Fitzsimons, believing their actions objectively reasonable, sought summary judgment of dismissal based on qualified immunity.[4] Respondents filed a cross motion seeking summary judgment of dismissal of the defense of qualified immunity.

During the summary judgment proceedings, respondents offered affidavit testimony of Ms. Murren, a forensic scientist. (ER 100.) She stated that, based on her review of the autopsy report and photographs and the statements of petitioner Lisoski, it was her "opinion that Mr. Bascomb was turning his body away from [petitioner] Lisoski at the time he was shot." (ER 102-103.)

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[3] Respondents alleged that the District Court had jurisdiction under 42 U.S.C. §§ 1983, 1986, and 1988; 28 U.S.C. §§ 1331 and 1343(a)(3); and the U.S. Constitution.

[4] The state law tort claim of respondents was not the subject of petitioners' motions for summary judgment.

During her deposition, however, Ms. Murren recanted the statement made in her affidavit regarding the movement of Mr. Bascomb:

> "Q [by Mr. Frey]: Okay. Now, in your testimony, which you've given by way of an affidavit, you indicate that it was your opinion that Mr. Bascom [sic] was turning away from the officer at the time he fired; is that correct?
>
> "A I don't believe I said turning away. I believe I said that his body was turned away slightly.
>
> "(Brief pause in the proceedings.)
>
> "A Oh, I do say turning his body away.
>
> "Q Okay. What do you have as a basis for making the determination that he was turning his body away at the time?
>
> "A I am afraid I don't. *I should have said his body was turned slightly away.*"

(Appendix "I," App. 59, emphasis added.) Later in the deposition, she again addressed this issue:

> "A *My testimony is that Mr. Bascom [sic] was slightly turned away from the officer at the time he fired. I am sorry that I ever said turning away, because that indicates movement at the time, and I have no way of knowing that.*"

(Appendix "I," App. 61, emphasis added.)[5]

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[5] Murren was not disclosed by respondents as a witness until respondents filed Murren's affidavit in support of their opposition to petitioners' summary judgment motions on or about January 13, 1992.

In February of 1991, petitioners submitted discovery requests to respondents, including requests to disclose experts.

In response to Ms. Murren's last-minute affidavit, petitioners offered affidavit testimony of Dr. Fligner, a board certified pathologist who was called to the scene and actually performed the autopsy of Mr. Bascomb's body. (Ms. Murren had relied on Dr. Fligner's reports and photographs.) Dr. Fligner agreed with petitioner Lisoski's testimony:

> "It is my opinion that the path of the bullet through the body is consistent with the shot being fired from a horizontal plane and a person on the loveseat leaning forward in a sitting position and twisting toward the door."

(ER 144, 146).[6]

Respondents answered these requests in May of 1991, but failed to disclose Ms. Murren. In October of 1991, respondents submitted supplemental responses to the discovery requests, but again failed to disclose Ms. Murren. In December of 1991, respondents submitted second supplemental responses to the discovery requests, but again failed to disclose Ms. Murren. Respondents did not disclose Ms. Murren until nearly one year after petitioners asked respondents to disclose the identity of expert witnesses.

The deposition of Ms. Murren took place on March 16, 1992, over two months after petitioners moved for summary judgment. Consequently, the Murren deposition excerpts were not offered as an exhibit to the District Court. The District Court did not believe that the alleged movement of Mr. Bascomb at the time the shot was fired presented a material issue. Only the Ninth Circuit concluded that issue was material. Petitioners attached the Murren deposition excerpts to a motion to supplement record, which was filed in the Ninth Circuit concurrently with the petition for rehearing with suggestion for rehearing *en banc*. (Appendix "I," App. 51.) The Ninth Circuit never ruled on that motion.

[6] Dr. Fligner is a physician who is board certified in forensic pathology. She has performed over 1,400 autopsies. Her

In rendering its decision on the cross-motions for summary judgment, the District Court did not believe that any alleged conflict between the affidavits of Ms. Murren and Dr. Fligner regarding the "position in which Mr. Bascomb's body was moving" was material; the District Court instead concluded that it was completely undisputed "that [Mr. Bascomb] was lifting his body up from the couch." (Appendix "F," App. 24-25, n. 4.)

The District Court remarked that, under *Hunter v. Bryant*, 502 U.S. ___, 116 L.Ed.2d 589, 112 Sup. Ct. 534 (1991), this Court instructed the Ninth Circuit that:

> "A court 'should ask whether the [government officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.' "

(Appendix "F," App. 22, *citing Hunter v. Bryant*.) The District Court correctly recognized that, under *Hunter*, "the court essentially is required to apply a different standard to a qualified immunity summary judgment determination than it would on other summary judgment motions." (*Id.*) Despite the District Court's accurate recitation of the *Hunter* standard, the Court applied a dramatically different and improper standard. The Court stated that because the dispositive issue was "one of the

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conclusions are based on her personal examination and autopsy of the body and her visit to the incident scene before the body was removed.

In contrast, Ms. Murren's opinions are based on her review of Dr. Fligner's reports and photographs taken during the autopsy. She is not a physician; she has a chemistry degree.

reasonableness of the government officer's conduct," it "applied traditional summary judgment standards." (*Id.*, App. 23.)

Under that standard, the District Court denied petitioners' motions for dismissal and concluded that genuine issues of material fact existed which precluded the entry of summary judgment because petitioner Lisoski: (a) fired "almost immediately upon observing" Mr. Bascomb; (b) "could not detect whether the object" pointed at him was a weapon; and (c) did not know "that persons in the apartment were armed." (*Id.*, App. 24-25.) The District Court further concluded that "the reasonableness of [petitioner] Fitzsimons' actions must be left to the jury." (*Id.*, App. 37.) In apparent contradiction, however, the District Court granted respondents' motion striking the defense of qualified immunity. (*Id.*, App. 26.)

3. Proceedings in the Court of Appeals and this Court.

Petitioners Lisoski and Fitzsimons appealed to the Ninth Circuit under 28 U.S.C. § 1291 and sought reversal of (a) the denial of their summary judgment motions based on qualified immunity, and (b) the ruling granting respondents' cross-motion for summary judgment dismissing the qualified immunity defense. Before briefing commenced, the Ninth Circuit issued an order in which it stated that the "record reveals a possible jurisdictional defect in the appeal." (Appendix "E," App. 8.) It instructed that the jurisdictional issue be addressed in a motion to dismiss or, if no motion to dismiss was filed, in petitioners' opening brief. (*Id.*) Respondents filed a

motion to dismiss the appeal, which was granted by the Ninth Circuit. (Appendix "D," App. 7.)

Petitioners then filed a petition for writ of certiorari and contended (a) that the Ninth Circuit had jurisdiction over the District Court's order denying respondents' claim of qualified immunity under the collateral order doctrine pronounced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); and (b) that petitioners were entitled, as a matter of law, to qualified immunity. (*See* No. 92-1089.) This Court summarily granted the petition for writ of certiorari, vacated the judgment of the Ninth Circuit, and remanded the matter to the Ninth Circuit for further consideration of the jurisdiction issue. (Appendix "C," App. 6.) This Court did not reach the issue of whether petitioners were entitled to qualified immunity from suit.

The Ninth Circuit reinstated the appeal. (Appendix "B," App 5.) Following briefing and oral argument, the Ninth Circuit issued a memorandum decision in which it recognized that petitioner Lisoski testified that he observed the decedent rise "from the couch and [point] an object directly at [petitioner Lisoski] that the officer believed to be a gun." (Appendix "A," App. 3.) Despite this testimony, and the absence of any contradictory evidence, the Ninth Circuit refused to grant summary judgment because it believed (apparently based on the affidavit of Murren) that Mr. "Bascomb was turning away from the officer and could not have been perceived as a looming threat." (*Id.*, App. 3.) The Ninth Circuit accordingly ruled [*citing Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1983)] that further evidentiary proceedings were necessary before it could be determined whether

petitioner Lisoski's use of force was objectively reasonable. (*Id.*, App. 3.) The Ninth Circuit refused to instruct the District Court to reinstate petitioners' defense of qualified immunity. Instead, the Ninth Circuit opined that the District Court planned to reserve that issue for trial. (*Id.*, App. 2., n. 1.)

Petitioners timely filed a petition for rehearing with suggestion for rehearing *en banc*, which the Ninth Circuit denied. (Appendix "G," App. 47.) Concurrently, petitioners filed a motion to supplement the record (Appendix "I," App. 51), which the Ninth Circuit never addressed.

REASONS FOR GRANTING THE PETITION

Petitioners are entitled to summary judgment of dismissal on qualified immunity grounds if "reasonable [officials] could have believed [petitioners' actions] to be lawful, in light of clearly established law and the information [petitioners] possessed." *Hunter v. Bryant*, 116 L.Ed.2d at 595, *quoting Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The "reasonableness" of petitioner Lisoski's use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. at 396-397. The

question of qualified "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 116 L.Ed.2d at 596, *citing Mitchell v. Forsyth*, 472 U.S. 511, 527-29 (1985). It is "separate from the merits of the underlying action" even though there may be factual overlap. *Mitchell v. Forsyth*, 472 U.S. at 528-529.

Although portions of the Ninth Circuit's opinion touch on these principles, the operative portion of the Ninth Circuit's opinion applies a dramatically different and improper standard, which contravenes decisions of this Court. Rather than asking whether a reasonable officer in petitioner Lisoski's position could have interpreted the facts and circumstances as he did, the Ninth Circuit applied its own interpretation of the events in contravention of the requisite standard established by this Court. Instead of applying the *Hunter* standard – which was the progeny of a long line of this Court's precedence – the Ninth Circuit impermissibly second guessed petitioner Lisoski. The Ninth Circuit substituted its judgment in the cool deliberate atmosphere of the appellate court for the judgment of petitioner Lisoski who, while involved in serving a valid search warrant in a darkened apartment where drugs had been found before, made a split second decision to fire his weapon when a man pointed an object at him that he believed was a gun.

The error of the Ninth Circuit's approach is apparent. It cuts the heart from the qualified immunity defense. Qualified immunity exists to permit public officers performing discretionary functions to be free from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v.*

Fitzgerald, 475 U.S. 800, 814 (1982). It is much more than merely a defense to liability. There is no place in the qualified immunity analysis for a court to engage in after-the-fact second guessing of an officer's actions.

This Court should accept review. The lower courts' decisions directly contravene decisions of this Court and threaten a unique federal interest – the right to an early and proper consideration of a qualified immunity defense. The lower courts' decisions will chill the actions of conscientious law enforcement officials. The decisions below, therefore, present questions of exceptional importance.

In addition, the federal courts need further guidance on the proper application of qualified immunity. The District Court and the Ninth Circuit ignored this Court's admonitions contained in *Hunter v. Bryant* (which the Ninth Circuit failed to even cite), where this Court summarily reversed the Ninth Circuit when it similarly substituted its judgment for that of a hypothetical reasonable police officer confronted with the same circumstances.

1. The Ninth Circuit failed to correctly acknowledge the special nature of the qualified immunity summary judgment determination. The Ninth Circuit ignored that a damages action may not proceed simply because a plaintiff has claimed that an after-the-fact inquiry, based on facts unavailable to a defendant, could disclose that constitutional rights were violated. Such a result could lead to unduly timid law enforcement; the official defending the lawsuit and facing potential person liability would have a strong incentive to "error always on the side of caution." *Davis v. Scherer*, 468 U.S. 183, 196 (1984). The

fear of being sued would " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow v. Fitzgerald*, 457 U.S. at 814 (bracket in original, citation omitted).

The nature of the reasonableness requirement of the Fourth Amendment buttresses the conclusion that the Ninth Circuit erred in substituting its judgment for that of petitioners. That standard addresses the same considerations as the qualified immunity standard – the need to permit law enforcement officials to make split second decisions based on the facts and circumstances presented to them, rather than viewing their actions with the safe and sanitized vision of hindsight.

This Court has ruled that apprehension by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). However, the nature and quality of the intrusion must be balanced against the importance of the government interests at stake. *Id.* at 8. Thus, an officer may use deadly force if, under the circumstances, he or she reasonably believed that force was necessary to protect himself or herself or others from death or serious physical harm. *Id.* at 11-12.

Despite these pronouncements, the Ninth Circuit did exactly what it was not permitted to do – consider facts that were unavailable to the officer at the scene and review those facts through the prism of hindsight. The only relevant facts and circumstances are those faced by petitioner Lisoski. The following is completely undisputed:

A. At the time of the incident, the ACT was serving a search warrant for narcotics on an apartment that had previously been searched; narcotics were found and seized. (ER 33; ER 108.)

B. Defendant Lisoski was the first officer to enter the apartment, which was dark. Immediately after entering, he observed a person rapidly raise his arm and point an object at him, which he believed was a gun. Fearing that he would be shot, he fired his weapon. The bullet struck and killed Mr. Bascomb. (Appendix "F," App. 10; ER 30-31; 55; 109-110; 145-146.)

C. A coroner's inquest jury examined the circumstances of the incident. The jury unanimously found (i) Mr. Bascomb pointed an object at petitioner Lisoski; (ii) petitioner Lisoski believed the object was a gun; (iii) petitioner Lisoski's belief was "reasonable in light of the facts, circumstances and conditions as they appeared to [petitioner] Lisoski at the time"; (iv) petitioner Lisoski reasonably believed that those circumstances presented imminent danger of death or bodily injury to petitioner Lisoski and his colleagues; and (v) "the force used by [petitioner] Lisoski [was] necessary." (ER 56-57.)

There is absolutely no evidence in the record that could lead all reasonable officers in petitioner Lisoski's position to conclude that his actions were objectively unreasonable, which under the correct standard *must* be the case for a court to reject a claim of qualified immunity. Even the District Court concluded: "It may well have been reasonable for [petitioner] Lisoski to fire his weapon once he perceived that an individual in the apartment was raising himself up off the couch and pointing an

object toward him. . . . " (Appendix "F," App. 24.) This conclusion alone, under the proper standard, justifies immunity.

In support of their claim that petitioner Lisoski's actions were not objectively reasonable, respondents submitted the affidavit of Ms. Murren, written for her by respondents' attorney; Ms. Murren is a forensic scientist. (ER 100.) She stated that, based on her review of the autopsy report and photographs, and petitioner Lisoski's statements, "Mr. Bascomb was turning his body away from [petitioner] Lisoski at the time he was shot." (*Id.*)

In turn, petitioners offered affidavit testimony of Dr. Fligner, a board certified forensic pathologist who actually performed the autopsy of Mr. Bascomb's body and examined Mr. Bascomb's body on the scene. She stated:

> "Based on my examination of the scene, and the autopsy of the body, it is my opinion that the path of the bullet through the body is consistent with a shot being fired from a horizontal plane at a person on the loveseat leaning forward in a sitting position and twisting toward the door."

(ER 146.) Despite the fact that Dr. Fligner was an expert forensic pathologist whose opinion was based on her examination of the scene and the body, and Ms. Murren's facially contradictory affidavit was based upon the review of the materials prepared at the behest of Dr. Fligner – and, indeed, failed to disclose the basis of her opinion that "Mr. Bascomb was turning his body away" – the Ninth Circuit concluded that Ms. Murren's testimony created an issue of fact. The Ninth Circuit characterized Ms. Murren's affidavit testimony as standing for the proposition that "Bascomb was turning away from the

officer *and* could not have been perceived as a looming threat." (Appendix "A," App. 3, emphasis added.)

But Ms. Murren's opinion, under the proper qualified immunity standard, is entirely immaterial. It consists of nothing more than after-the-fact speculation and hindsight and is not a "fact" that was, or reasonably should have, been known to a reasonable officer in petitioner Lisoski's position.

Despite the infirmities in the District Court's decision, it was correct in concluding that the apparent conflict between the opinions of Ms. Murren and Dr. Fligner as to the position in which Mr. Bascomb's body was moving at the time he was shot is immaterial. That so-called factual dispute did not involve matters perceived by petitioner Lisoski. The District Court correctly concluded that the only material fact was that Mr. Bascomb was rising from the couch and pointing an object at petitioner Lisoski. As the District Court concluded, "[r]egardless of the direction that Mr. Bascomb was turning his torso at the time the shot was fired, it appears that he was lifting his body up from the couch." (Appendix "F," App. 24-25, n. 4.) It is entirely undisputed that Mr. Bascomb pointed an object at petitioner Lisoski, which petitioner Lisoski believed to be a gun based on petitioner Lisoski's training and experience and the rapid manner in which Mr. Bascomb's hand pointed directly at petitioner Lisoski. The qualified immunity standard recognizes that it is easy for a court, after-the-fact, to second guess an officer. That is exactly what the lower courts did in this case.

Moreover, respondents' affiant, Ms. Murren, completely recanted the statement made in her affidavit regarding the movement of Mr. Bascomb. She testified that she had no basis for making a determination that his body was turning away and, indeed, testified "I should have said his body was turned slightly away." (Appendix "I," App. 59.) She later stated:

> "My testimony is that Mr. Bascom [sic] was slightly turned away from the officer at the time he fired. I am sorry that I ever said turning away, because that indicates movement at the time, and I have no way of knowing that."

(*Id.*, App. 61.)

2. A careful analysis of the grounds of the Ninth Circuit's decision demonstrates the infirmities of the court's reasoning. The Ninth Circuit first correctly noted that petitioner Lisoski observed Mr. Bascomb rise from the couch and point an object at petitioner Lisoski that he believed was a gun. (Appendix "A," App. 3.) The Ninth Circuit then diverged from the required analysis when it stated, based on discredited affidavit testimony of Murren, that "Bascomb was turning away from the officer *and* could not have been perceived as a looming threat." (Appendix "A," App. 3, emphasis added.) The Ninth Circuit's statement is comprised of two components, a statement of *fact* as to the movement of Mr. Bascomb at the moment the shot was fired, and a statement of *opinion* as to whether petitioner Lisoski reasonably could have perceived Mr. Bascomb as a threat to petitioner Lisoski and his fellow officers, which would entitle petitioner Lisoski to use deadly force. Neither statement precludes

summary judgment of dismissal based on qualified immunity.

The factual statement is immaterial and irrelevant and, in any event, inaccurate. The direction in which Mr. Bascomb was moving, particularly in a dark room, has no bearing on whether a reasonable officer in petitioner Lisoski's position could have believed that force was necessary to protect himself or others from harm. The relevant factual circumstances are that petitioner Lisoski saw Mr. Bascomb rise from the couch, which is undisputed, and that petitioner Lisoski saw Mr. Bascomb rapidly point an object at him, which is also undisputed. Under these circumstances, a reasonable officer could conclude he was about to be shot and discharge his weapon. Petitioner Lisoski did not have to wait to be shot before he could lawfully exercise deadly force.

The opinion statement is gratuitous and irrelevant and fails to address the ultimate question in the qualified immunity analysis – could a reasonable officer in petitioner Lisoski's position have interpreted the circumstances the way he did? If the answer to this question is yes, petitioners are immune.

But instead of asking this question, the Ninth Circuit appeared to ask whether there exists another reasonable or perhaps even more reasonable interpretation of the events than the one on which petitioner Lisoski acted. That is precisely what this Court instructed the Ninth Circuit it was not permitted to do in *Hunter v. Bryant*. *See* 116 L.Ed.2d at 596. Yet, more than three years after *Hunter*, the Ninth Circuit continues to impermissibly second guess officers.

In concluding that "further evidentiary proceedings" were necessary before it could be determined whether petitioner Lisoski "objectively reasonably believed" he was entitled to use deadly force, the Ninth Circuit stated (Appendix "A," App. 3) it relied upon the portion of its decision in *Act Up!/Portland Bagley*, wherein the court reasoned that two categories of factual issues may preclude a legal determination of summary judgment:

> "First, . . . an inquiry as to the facts and circumstances within an officer's knowledge[; and second,] the determination of what conduct underlies the alleged violation – what the officer and claimant did or failed to do."

988 F.2d at 873 (citations omitted). Here, the Ninth Circuit concluded that the ostensible fact issue in this case fell within the first category – it concluded that it was necessary to conduct further factual proceedings concerning the facts and circumstances within petitioner Lisoski's knowledge. That conclusion is incorrect for several reasons.

First, the facts and circumstances within petitioner Lisoski's knowledge are well developed and not subject to dispute. Petitioner Lisoski filled out an incident report, testified before the inquest jury, signed affidavits, and was subject to deposition by respondents' attorneys. There is no legitimate or remaining question for a court and jury as to the information that petitioner Lisoski possessed. Second, while the Ninth Circuit states otherwise, its conclusion appears to sanction an inquiry into the mental processes and motives of petitioner Lisoski, which this Court has repeatedly instructed is impermissible. *See, e.g., Anderson v. Creighton*, 483 U.S. at 641; *Harlow*

v. Fitzgerald, 457 U.S. at 817, n. 29. The Ninth Circuit appears to sanction a subjective analysis.

The Ninth Circuit's citation to and reliance on *Act Up!/Portland v. Bagley*, illustrates that, despite the clear precedent of this Court, the Ninth Circuit remains confused and needs further instruction as to the proper scope of the qualified immunity inquiry. In *Act Up!/Portland v. Bagley*, the Ninth Circuit cited *Hunter v. Bryant* and ruled that, in the qualified immunity context, the objective reasonableness of an officer's actions is "a question of law to be determined by the court." 988 F.2d at 873. The *Act Up!/Portland v. Bagley* dissent, however, contends that the majority decision overturned existing circuit law and was contrary to the law of seven other circuits. 988 F.2d at 874, n. 1 (Norris dissenting.) The *Act Up!/Portland v. Bagley* decision, and the Ninth Circuit's reliance on it in this case, demonstrates that the Ninth Circuit needs additional guidance on the proper scope of the qualified immunity inquiry.

3. Because petitioner Lisoski's actions did not deprive Mr. Bascomb of any constitutional rights, no liability can attach to petitioner Fitzsimons' actions. The fundamental issue in this case is whether petitioner Lisoski's actions deprived Mr. Bascomb of his Fourth Amendment rights. As demonstrated above, they did not. Because Mr. Bascomb's constitutional rights were not violated by petitioner Lisoski's actions, petitioner Fitzsimons is also immune.

The *only* proper inquiry is whether petitioners themselves acted within the bounds of reason and competence in assessing the situation. Had the Ninth Circuit asked

this question, it would have concluded that petitioners acted reasonably and were therefore entitled, as a matter of law, to immunity.

CONCLUSION

The Petition for Writ of Certiorari should be granted and this Court should reverse on the ground that petitioners were entitled to qualified immunity.

Respectfully submitted,

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April, 1994

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb; FRANK BASCOMB, SR.; FLORA O. BASCOMB, Plaintiffs-Appellees, v. CITY OF SEATTLE; POLICE CHIEF PATRICK S. FITZSIMONS AND JANE DOE FITZSIMONS, and their marital community; ROBERT LISOSKI and JANE DOE LISOSKI, and their marital community, Defendants-Appellants.	No. 92-35436 DC No. CV-91-51-BJR MEMORANDUM* (Filed Oct. 28, 1993)

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding
Argued and Submitted October 4, 1993
Seattle, Washington

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The Bascombs have sued Officer Robert Lisoski and Chief Fitzsimons under 42 U.S.C. § 1983, claiming that Lisoski used excessive force when he seized Erdman Bascomb by fatally shooting him. The Bascombs argue that Fitzsimons failed to adequately train, supervise, or discipline his officers, which was a proximate cause of Erdman Bascomb's death. The defendants now appeal the district court's refusal to grant summary judgment in their favor based on their qualified immunity defense.[1]

I

Section 1983 defendants are entitled to qualified immunity if (1) the "right" that they allegedly violated was not "clearly established" at the time of a violation, or (2) if a reasonable officer would have thought that the defendant's actions were constitutional – that is, if the defendant acted objectively reasonably. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 814-20 (1982).

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[1] Appellants argue that immediately after denying the defendants' motion for summary judgment because there were material issues of fact regarding the availability of qualified immunity, the court *granted* the plaintiffs' motion for "summary judgment of dismissal of the qualified immunity defense." This, appellants argue, is an internally inconsistent decision, which must be corrected by this court. It is clear, however, that despite the misleading title given to the plaintiffs' motion, the judge was not definitively deciding the qualified immunity issue in favor of the plaintiffs, but rather planning to proceed with a trial. E.R. at 342 ("[A] as with Officer Lisoski's motion for qualified immunity, the reasonableness of Chief Fitzsimons' actions must be left to the jury.").

a. *Officer Lisoski*

The district court properly denied Officer Lisoski's motion for summary judgment because the facts and circumstances surrounding Bascomb's death are sharply disputed. According to Officer Lisoski, when the police entered Bascomb's apartment at approximately 11:45 p.m. with a battering ram, Bascomb rose from the couch and pointed an object directly at him that the officer believed to be a gun. According to evidence submitted by the plaintiff, Bascomb was turning away from the officer and could not have been perceived as a looming threat.

Thus, whether Officer Lisoski is entitled to qualified immunity because he objectively reasonably believed that deadly force was appropriate cannot be determined without further evidentiary proceedings. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) ("Where a Fourth Amendment violation is claimed, the factual issues that may preclude a determination of qualified immunity on summary judgment . . . [include] the facts and circumstances within an officer's knowledge.").

b. *Chief Fitzsimons*

For similar reasons, the district court properly denied Chief Fitzsimons' motion for summary judgment as well. Plaintiffs contend that Chief Fitzsimons proximately caused Erdman Bascomb's death because although he had notice that Anti-Crime Team ("Act") offices [sic] were performing their duties in a manner that seriously

increased the risk of harm,[2] and that several other innocent people had in fact been endangered or killed by accidental shootings in the months prior to Bascomb's death, he failed to discipline or train his officers to prevent these sorts of accidents. Wrongful deaths and other mishaps concerning the ACT squads had been covered in the Seattle media, and Chief Fitzsimons had received a letter and other warnings from an officer of his own department, the leader of ACT I, urgently requesting that something be done about the ACT officers' behavior. In light of this evidence, it is impossible to say at this stage in the proceeding that as a matter of law, Chief Fitzsimons acted objectively reasonably.

AFFIRMED.

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[2] For example, plaintiffs presented evidence that ACT officers routinely violated the knock and announce rule when executing warrants, and that they made a practice of executing their warrants late at night without using flashlights.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as personal representative of the Estate of Erdman Bascomb; FRANK BASCOMB, Sr., et al., Plaintiffs-Appellees, vs. CITY OF SEATTLE, et al., Defendants-Appellants.	No. 92-35436 DC# CV-91-51-BJR Washington (Seattle) ORDER (Filed May 17, 1993)

Before: HUG, WIGGINS and THOMPSON, Circuit Judges

In light of the United States Supreme Court order filed in this court on April 22, 1993, this appeal is reinstated. The motion to dismiss the appeal filed in this court on July 27, 1992 is denied. This appeal shall be expedited as follows: on or before June 14, 1993 appellants shall file a supplemental brief of no more than 15 pages addressing the jurisdictional questions raised by this appeal. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf Eddy, Inc.*, 113 S. Ct. 684 (1993); *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993). Appellees' brief is due July 14, 1993. The optional reply brief is due July 28, 1993. The Clerk shall set these matters for argument in Seattle during the week of August 30, 1993.

MoCal 5/12/93/sj

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON D.C. 20543

(Filed April 18, 1993)

Mr. Thomas D. Frey
500 Watermark Tower
88 Spring Street
Seattle, WA 98104

Re: City of Seattle, et al.
v. Paul A. Bascomb, et al.
No. 92-1089

Dear Mr. Frey:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___ (1993).

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb, et al., Plaintiffs-Appellees, vs. CITY OF SEATTLE, et al., Defendants-Appellants.	No. 92-35436 DC# CV-91-51-BJR Washington (Seattle) ORDER (Filed Sept. 21, 1992)

Before: GOODWIN, D.W. NELSON and REINHARDT, Circuit Judges

Appellees' motion to dismiss the appeal is granted. *See Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987) (denial of claim of qualified immunity not appealable where bound up with disputed factual issue).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb, et al.,	)	No. 92-35436
	)	DC# CV-91-51-BJR
Plaintiffs-Appellees,	)	Western Washington
vs.	)	(Seattle)
CITY OF SEATTLE, et al.,	)	ORDER
Defendants-Appellants.	)	(Filed June 23, 1992)

The record reveals a possible jurisdictional defect in the appeal. *See Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987) (denial of claim of qualified immunity not appealable where bound up with disputed factual issue).

The jurisdictional issue shall be addressed either by appellees in a motion to dismiss the appeal, or, if no motion to dismiss is filed, by appellants in their opening brief.

For the Court:

/s/ Meg Gerrity
Meg Gerrity
Motions Attorney/Deputy Clerk
Local Rule 27-7

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb, et al., Plaintiffs, v. THE CITY OF SEATTLE, et al., Defendants.	NO. C91-51R ORDER RE PENDING MOTIONS ON LIABILITY ISSUES

THIS MATTER comes before the court on the parties' cross-motions for summary judgment on the issue of defendant Robert Lisoski's qualified immunity, on defendant Patrick Fitzsimons' motion for summary judgment of dismissal of all claims against him, on defendant City of Seattle's motion for summary judgment of dismissal of plaintiffs' municipal liability claim, on defendants' motions to strike the affidavits of Carol Murren and Robert McBride, and on plaintiffs' motion for summary judgment of dismissal of defendants' affirmative defenses Nos. 3-6. Having reviewed the motions, together with all documents filed in support and in opposition, having heard oral argument and being fully informed, the court finds and rules as follows:

I. FACTUAL BACKGROUND

On February 17, 1988, during the execution of a search warrant at 3610 36th Ave. S., Apt. C in Seattle, Officer Robert Lisoski mistakenly shot and killed Erdman Bascomb. In January 1991, plaintiff Paul Bascomb, the personal representative of the estate of Erdman Bascomb, filed this action against the City of Seattle, Police Chief Patrick S. Fitzsimons and Officer Lisoski. In August 1991, this court granted plaintiff's motion to amend the complaint to include Erdman Bascomb's parents, Frank and Flora Bascomb, as plaintiffs. Plaintiffs' complaint alleges three causes of action: (1) a civil rights violation based on the acts of Officer Lisoski; (2) a civil rights violation based on the unlawful policies, practices and customs of the City of Seattle; and (3) a negligence claim against Officer Lisoski.

Defendants now move for summary judgment on the issue of Officer Robert Lisoski's qualified immunity from suit. Plaintiffs move for summary judgment of dismissal of the qualified immunity defense. Defendants also move to strike the affidavits of Robert McBride and Carol Murren filed in support of plaintiffs' memoranda on the qualified immunity issue. Defendants further move for summary judgment of dismissal of plaintiffs' claims against Police Chief Patrick Fitzsimons and for summary judgment of dismissal of plaintiffs' civil rights claims based on alleged unlawful policies, practices and customs of the City of Seattle. Plaintiffs also move for partial summary judgment on defendants' affirmative defenses Nos. 3-6.

II. DISCUSSION

A. Motion to Strike Affidavits of Robert McBride and Carol Murren

In support of their motion for summary judgment of dismissal of the qualified immunity defense and in opposition to defendants' motion on the same issue, plaintiffs have submitted the affidavits of Robert McBride, a former police officer who is currently a private investigator, and Carol Murren, a forensic scientist. Mr. McBride's affidavit addresses the procedure used by Officer Lisoski and the Anti-Crime Team to execute the Bascomb warrant. Ms. Murren's affidavit discusses the position of Erdman Bascomb's body relative to Officer Lisoski at the time Mr. Bascomb was struck by the bullet that killed him.

Under Fed. R. Civ. P. 56(f), affidavits submitted in support of a motion for summary judgment are to set forth "such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Defendants argue that as neither Mr. McBride nor Ms. Murren is qualified as an expert within the meaning of Fed. R. Evid. 702, their affidavits would not be admissible in evidence and must be stricken. Defendants argue that although it is permissible for an expert to compare the conduct of parties to the industry standard, as Mr. McBride does in his affidavit, Mr. McBride sets forth no basis upon which the court may find that he has established an industry standard. Defendants have submitted their own affidavits indicating that Mr. McBride, when he was with the Olympia Police Department, did not himself follow any of the procedures he sets forth as being industry standards. *See*

Reply Memorandum Regarding Robert McBride and Carol Murren at 2; Affidavit of Tim Perry; Affidavit of Commander William Curtright. Defendants further argue that Ms. Murren sets forth no information indicating that she is qualified to determine the path of a bullet through a human body or how to locate the relationship of the weapon to the human body. Defendants also point out that Ms. Murren never actually viewed Mr. Bascomb's body but rather relies in her affidavit entirely on the autopsy performed by Dr. Corinne L. Fligner.

Defendants arguments are without merit. An individual may qualify as an expert under Fed. R. Evid. 702 by knowledge, skill, experience, training or education. Mr. McBride and Ms. Murren have attached to their affidavits either a copy of their resume or a statement regarding their qualifications.

Mr. McBride's resume indicates that he was a police officer for almost 18 years, during which time his duties included considerable training and supervising activities, including supervision of a multi-jurisdictional drug unit. His training as a police officer included numerous courses in various kinds of law enforcement. The court is convinced that Mr. McBride's knowledge, skill, experience and training all qualify him as an expert under Rule 702 for the purpose of offering his opinion regarding the reasonableness of defendants' actions during the execution of the search warrant. That defendants can offer affidavits refuting Mr. McBride's opinions does not go to his qualification as an expert, rather defendants' affidavits affect the weight of Mr. McBride's expert testimony.

Ms. Murren states in her affidavit that she has had training in the analysis of bullet trajectory and previously has been qualified as an expert in this area. She has been employed as a forensic scientist since 1975, first by the Washington State Patrol Crime Laboratory System and now with her own forensic services company. Ms. Murren's resume also refers to her practical experience dealing with bullet trajectory and with crime scene reconstruction. The court again is convinced that Ms. Murren's knowledge, skill and experience qualify her as an expert under Rule 702 for the purposes of discussing the position of Mr. Bascomb's body at the time he was shot. Again, the fact that defendants have submitted affidavits that refute the testimony set forth in Ms. Murren's affidavit goes to the weight of this evidence, not its admissibility. Accordingly, defendants' motion to strike the affidavits of Robert McBride and Carol Murren will be denied.

B. Standard of Review on Motions for Summary Judgment

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630-631 (9th Cir. 1987); *Lew v. Kona Hospital,* 754 F.2d 1420, 1423 (9th Cir. 1985). Summary judgment is not appropriate if "a result other than that proposed by

the moving party is possible under the facts and applicable law." *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983).

C. Cross-Motions for Summary Judgment on Issue of Qualified Immunity

"Government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 818 (1982). Government officials are presumed to have knowledge of clearly established law and to be able to act reasonable with respect to that law. A determination of whether the qualified immunity doctrine applies in a particular case focuses on two inquiries: (1) whether the constitutional rights allegedly violated were clearly established at the time of defendants' conduct; and (2) whether defendants' conduct was objectively reasonable with reference to the clearly established law.

The operation of these standards interacts with the level of generality at which plaintiff's rights are identified. *Anderson v. Creighton, et al.*, 483 U.S. 635, 639 (1987). As the Supreme Court stated in *Anderson*,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official actor is protected by qualified immunity unless the very action in question previously has been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640.

Finally, the issue of qualified immunity ordinarily is one that "should be decided by the court long before trial." *Hunter v. Bryant*, 112 S.Ct. 534, 537 (1991). Qualified immunity precludes litigation, it is not merely a defense against liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Plaintiffs allege that Mr. Bascomb's clearly established rights were violated both when the Anti-Crime Team executing the warrant did not follow the knock and announce statute, 18 U.S.C. § 3109, and when Officer Lisoski used unreasonable force in shooting Mr. Bascomb.[1]

Defendants response to twofold. First they argue that the rights asserted by plaintiffs were not clearly established. Second, they argue that Officer Lisoski's actions were objectively reasonable.[2]

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[1] Plaintiffs originally also allege that Mr. Bascomb's Fourteenth Amendment due process rights were violated when the ACT unit's execution of the search warrant placed Mr. Bascomb in a dangerous situation immediately prior to his being shot by Officer Lisoski. In their reply memorandum, plaintiffs acknowledge that based on recent Supreme Court and Ninth Circuit case law, excessive force claims are to be analyzed solely under the Fourth Amendment. *See* Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 13 n.6, *citing Graham v. Connor*, 490 U.S. 386 (1989); *Ward v. City of San Jose*, 948 F.2d 1097, 1102 (1991). Accordingly, plaintiffs now agree that their "dangerousness" claims should be folded into the Fourth Amendment reasonableness inquiry.

[2] Defendants have objected to the submission of plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and in Opposition to Defendants' Motion for Summary Judgment, Re: Qualified Immunity, filed on February

1. Clearly Established Rights

a. Unreasonable Seizure Through Use of Excessive Force

Under the Fourth Amendment, individuals have a right to be free from unreasonable seizures. The reasonableness of a particular seizure is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake." *See Graham v. Connor,* 490 U.S. 386 (1989). Defendants argue that,

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6, 1992. Defendants protest that plaintiffs were not entitled to address defendants' motion for summary judgment in this memorandum because plaintiffs previously had filed a memorandum in opposition.

Defendants' objection is without merit. Although Local Rule CR 7(b) ordinarily permits only a moving memorandum, an opposition memorandum and a reply memorandum, the posture in which this issue has been brought before the court necessitates some minor adjustments. In its opposition to defendants' motion for summary judgment on this issue, plaintiffs' [sic] also moved for summary judgment. Thus, at this point, although there were two pending motions for summary judgment, they addressed the same issue. In such cases, it is not unusual for a party to address both motions in a single memorandum. As defendants freely admit, they have filed three memoranda on this issue. The February 6 filing by plaintiffs was only their second memorandum on this issue. In an effort to permit the parties to fully address this issue – on which they have both moved – the court is not going to strike or disregard the portions of plaintiffs' second memorandum that use the language "opposition to defendants' motion". The motions address the same issue and are too clearly related to engage in such a process of selecting which portions of a memorandum are properly filed.

contrary to the admonishment of *Anderson*, plaintiffs have asserted their constitutional right in an overly broad manner. Through a reference to *Finnecan v. Fountain*, 915 F.2d 817 (2d Cir. 1990), defendants appear to make the argument that in order to assert a clearly established constitutional right of freedom from use of unreasonable force, plaintiffs must assert that the particular actions of Officer Lisoski were unconstitutional, i.e., an unreasonable search and seizure in violation of the Fourth Amendment. In *Finnegan*, the Second Circuit held that it was insufficient under the clearly established right inquiry to assert merely that a law enforcement officer used unconstitutionally excessive force. *Id.* at 823. That court held that under *Anderson*, even if the jury were to determine that the law enforcement officer did use excessive force, the trial court must still determine whether the unconstitutionality of his actions should have been apparent to the officer. *Id.* at 823-24.

Plaintiffs' assertion of a clearly established constitutional right here is not in conflict with either *Finnegan* or *Anderson*. This court concludes that plaintiffs have asserted a clearly established constitutional right with sufficient particularity when they allege that Officer Lisoski's shooting Erdman Bascomb violated his Fourth Amendment right to be free from use of unreasonable force. When a law enforcement officer shoots an individual, he has "seized" the individual for purposes of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Reed v. Hov.* [sic] 891 F.2d 1421, 1426 (9th Cir. 1989). In addition, use of deadly force to seize an unarmed individual is, in most circumstances, unreasonable. *Garner*, 471 U.S. at 13.

In *Garner*, the Supreme Court applied the Fourth Amendment reasonableness balancing test and found that the individual's interest in not being seized through deadly force is unmatched and that use of deadly force also frustrates society's interest in determination of guilt or innocence. *Id.* at 9. In the context of preventing a fleeing felon from escaping, the court stated that use of deadly force would be constitutional only where the suspect threatens the officer with a weapon, or where there is probable cause to believe the suspect has committed a crime involving the infliction or threatened infliction of serious harm. *Id.* at 11. Erdman Bascomb did not have a weapon, nor was there probable cause to believe that he had committed a crime involving infliction of harm. Whether Officer Lisoski's actions were nonetheless objectively reasonable is a separate element of determining whether Officer Lisoski is immune from liability.

The Supreme Court decided *Garner* in 1985, more than two years prior to Erdman Bascomb's death. Law enforcement officers are expected to be abreast of constitutional law developments. Accordingly, the court finds that Erdman Bascomb's constitutional right to be free from an unreasonable seizure through use of deadly force was clearly established on February 18, 1988.

b. Knock and Announce Statute

Defendants argue that regardless of whether the ACT members should have known that their actions violated clearly established law, the knock and announce statute, Officer Lisoski did not participate in the knock and announce portion of executing the warrant, and his entry

into the apartment was objectively reasonable. Thus, for purposes of this motion and without making a finding regarding whether the ACT members violated the knock and announce statute, the court will assume that plaintiffs sufficiently allege violation of a clearly established right. The reasonableness of Officer Lisoski's actions in entering the apartment will be addressed below.

2. Objective Reasonableness

The second prong of the qualified immunity analysis examines whether, in light of clearly established law, Officer Lisoski's actions were objectively reasonable.

a. Collateral Estoppel Effect of Inquest Jury Findings

Defendants first argue that the decision of the inquest jury exonerating Officer Lisoski precludes a different finding by this court. In *Shoemaker v. Bremerton*, 109 Wn.2d 504 (1987), the Washington Supreme Court concluded that factual findings of the Bremerton Civil Service Commission precluded a federal civil rights action based on the conduct already addressed by the Commission. Based on this decision, defendants argue that this court should apply collateral estoppel to the factual finding of the inquest jury that Officer Lisoski reasonably feared for his own safety. Defendants' Reply Memorandum in Support of Summary Judgment at 7.

Defendants' collateral estoppel argument is unpersuasive Application of the doctrine of collateral estoppel requires: (1) identity between the issue decided in the

prior adjudication and the issue in question in the current litigation; (2) a final judgment on the merits in the prior adjudication; (3) that the party against whom the moving party seeks to assert collateral estoppel be a party or in privity with a party to the prior adjudication; and (4) that the application of the doctrine not work an injustice on the party against whom it is asserted. *Shoemaker,* 109 Wn.2d at 507-08. Regardless of whether defendants would be able to establish identity of issues and parties, collateral estoppel does not apply in this case because it is unclear that the decision of the inquest jury is a final "judgment" on the merits and because this court determines that application of collateral estoppel would work an injustice on plaintiffs.

In giving preclusive effect to the Bremerton Civil Service Commission finding in *Shoemaker,* the Washington Supreme Court focused on the procedural protections given to plaintiff during the Commission proceedings and the similarity of the issues and parties at both proceedings. *Shoemaker,* 109 Wn.2d at 508-11. There are several differences between the procedures used by the Bremerton Civil Service Commission in *Shoemaker* and procedures used by the inquest jury here. First, in *Shoemaker* in the proceeding before the Bremerton Civil Service Commission, the plaintiff was represented by the same attorney who represented him in his civil rights action. In addition, plaintiff's counsel was permitted to cross-examine opposing witnesses, to present witnesses, to compel attendance of any witnesses she felt had relevant information, and to make opening and closing arguments. Second, Shoemaker had the opportunity to appeal the Commission's decision to Superior Court and to ask

the Commission for reconsideration. *Shoemaker*, 109 Wn.2d at 509-10. In *Bremerton*, plaintiff essentially sought a different forum for an identical claim.

In this case, although counsel from plaintiffs' current law firm was able to participate in the inquest proceedings, he had few of the same procedural opportunities. Although he was able to cross-examine witnesses, he did not have control over the evidence presented, he could not compel attendance of witnesses, and he could not make an opening or a closing argument. In addition, the family had no opportunity to appeal or to seek other review of the inquest jury's findings. *See* Affidavit of David Allen Re: Inquest, ¶¶ 3, 4, 7. Finally, the inquest judge declined to give an instruction submitted by plaintiffs' counsel on the knock and announce requirement. *Id.*, ¶ 6.

On the basis of the limited nature of plaintiffs' participation in the inquest proceedings, the court concludes that the inquest jury's finding of reasonableness does not preclude this court from revisiting that issue to determine whether Officer Lisoski is entitled to immunity from suit because his actions were objectively reasonable as a matter of law. While the factual findings of the inquest jury may be and have been, considered by this court, they are not dispositive.

b. Reasonableness of Use of Deadly Force

Second, defendants argue that Officer Lisoski's decision to shoot when faced with what he believed to be an

armed individual turning toward him was objectively reasonable.

In a recent decision, *Hunter v. Bryant*, 302 US ___, 116 L.Ed 589, 112 S.Ct. 534 (1991), the Supreme Court held that the Ninth Circuit erred in determining that qualified immunity should be granted at the summary judgment stage only where there is only one reasonable conclusion that a jury could reach. The Supreme Court instead emphasized that qualified immunity ordinarily should be decided long before trial and should not routinely be placed in the hands of the jury. *Id.* at 537. The Supreme Court further stated that in deciding a question of qualified immunity, a court "should ask whether the [government officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Id.*

Under *Hunter*, and as defense counsel urged this court to do at oral argument, the court essentially is required to apply a different standard to a qualified immunity summary judgment determination than it would on other summary judgment motions.[3] *Hunter* essentially requires the court rather than the trier of fact to make the reasonableness determination. In cases where factual disputes underlie the reasonableness determination, this standard places the court in a bit of a conundrum. Certainly, the Supreme Court could not have intended the trial court to resolve all questions of fact

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[3] Justice Scalia concurring in judgment and Justice Stevens dissenting both stated that the regular summary judgment standard should be used in determining qualified immunity.

before ruling on a motion for summary judgment based on qualified immunity. Such a procedure would completely usurp the province of the jury. In addition, in cases where the court, after complete development of the facts, were to conclude that the government officer's actions were not objectively reasonable, the court would be resolving the merits of the action in plaintiffs' favor.

The Ninth Circuit and other appeals courts have offered a different approach where the inquiry on the merits, as well as the inquiry on qualified immunity, is one of the reasonableness of the government officer's conduct. *See Hopkins v. Andaya*, 958 F.2d 881, No. 89-16368, at 1835 n.3 (9th Cir., March 24, 1992); *Curnow v. Ridgecrest Police*, 952 F.2d 321 No. 90-15314 (9th Cir. Dec. 26, 1991); *Hunter v. District of Columbia*, 943 F.2d 69, 75 (D.C. Cir. 1991). In these cases, all involving § 1983 claims based on use of unreasonable force, the courts applied traditional summary judgment standards. In the most recent Ninth Circuit case, *Hopkins*, the court on summary judgment analyzed the summary judgment motion solely on the merits of whether the government officer had used unreasonable force, addressing qualified immunity only in a footnote. *Hopkins*, slip op. at n.3. Thus, where there are genuine questions of material facts on the merits in an unreasonable force case, a grant of summary judgment based on qualified immunity is inappropriate.

Additionally, the case before this court is distinguishable from *Hunter* in several significant respects. In *Hunter*, the question was whether two Secret Service agents could reasonably believe that, under existing law, they had probable cause to arrest the plaintiff for making threats against the president of the United States. Courts are

accustomed to making probable cause determinations, and, in fact, in *Hunter* a United States Magistrate Judge agreed at an arraignment that probable cause existed to hold plaintiff for threatening the life of the president. In this case, however, the court is being asked to assess whether Officer Lisoski used reasonable force, a determination that juries, not courts, customarily make.

Furthermore, in *Hunter* the facts were uncontested. Hare, [sic] however, plaintiffs have disputed several facts related to the reasonableness of the force used by Officer Lisoski. While, as defendants argue, it may well have been reasonable for Officer Lisoski to fire his weapon once he perceived that an individual in the apartment was raising himself up off the couch and pointing an object toward him, this court must consider *all* of the circumstances. *Garner,* 471 U.S. at 8-9.

There is no doubt that Officer Lisoski shot Mr. Bascomb almost immediately upon observing him. *See* Deposition of Sergeant Patric Parker at 93. He detected only that Mr. Bascomb was moving from his prone position on a loveseat or couch and that Mr. Bascomb had an object in his hand. Deposition of Robert Lisoski at 100-01.[4] He could not detect whether the object was a

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[4] The parties offer quite different versions of the position in which Mr. Bascomb's body was moving at the time Officer Lisoski shot him. Officer Lisoski states that Erdman Bascomb was moving toward him. Deposition of Robert Lisoski at 95-96. Corinne L. Fligner, the pathologist who performed the autopsy on Mr. Bascomb states that the path of the bullet through the body is consistent with a shot being fired from a horizontal plane at a person leaning forward in a sitting position and twisting toward the door. Affidavit of Corinne L. Fligner at 3.

weapon. He had no information that persons in the apartment were armed. The court finds that these facts raised a genuine issue of material fact as to whether Officer Lisoski's actions were reasonable. Defendants' motion for summary judgment based on Officer Lisoski's qualified immunity will be denied on plaintiffs' Fourth Amendment unreasonable force claim.

c. Reasonableness of Entry After Knocking and Announcing Presence

The court concludes, however, that Officer Lisoski's actions in entering the apartment immediately after the door was opened were objectively reasonable and do preclude suit against Officer Lisoski on plaintiffs' claim based on violation of the knock and announce statute. Regardless of the manner in which the ACT members knocked and announced, the court is convinced that a reasonable police officer whose assignment within the group of officers executing the warrant was to enter the dwelling once a means of access had been secured would not wait to perform that assignment while he decided whether the other officers had adequately performed their assignment. *See* Affidavit of Tim Perry at 3. Plaintiffs offer no evidence to counter this assessment.

Carol Murren, plaintiffs' expert, states that based on Officer Lisoski's position inside the apartment that it is her opinion that the path of the bullet is consistent with Mr. Bascomb turning his body *away* from Officer Lisoski. Regardless of the direction that Mr. Bascomb was turning his torso at the time the shot was fired, it appears that he was lifting his body up from the couch.

In summary, defendants' motion for summary judgment on qualified immunity will be denied and plaintiffs' motion for summary judgment of dismissal of the qualified immunity defense will be granted as to plaintiffs' Fourth Amendment unreasonable seizure claim. Defendants' motion will be granted as to plaintiffs' Fourth Amendment claim based on defendants' alleged violation of the knock and announce statute.

D. Municipal Liability

A municipality may be held liable under 42 U.S.C. § 1983 for official policies or customs that result in the deprivation of rights. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). Plaintiffs allege that the City of Seattle, through its police department, is liable for violation of Erdman Bascomb's rights on two bases. First, plaintiffs allege that the Seattle Police Department maintained unlawful customs and practices in the execution of search warrants. Second, plaintiffs allege that the Seattle Police Department had a custom or practice of inadequate training, supervision and discipline of officers participating in Anti-Crime Teams ("ACT") and that this custom or practice amounted to deliberate indifference to the rights of those individuals with whom members of the ACT came into contact.

Defendants argue that the facts alleged by plaintiffs are inadequate as a matter of law to show an unlawful custom or practice attributable to the city. Specifically, defendants argue that each of the incidents alleged by plaintiffs to be part of the unconstitutional practices or

customs were thoroughly reviewed by the police department and that training with respect to the execution of search warrants, the use of firearms and for the ACT unite members was adequate.

Both parties present considerable information regarding the execution of various search warrants by the ACT members, the training provided to these officers, the reactions and responses of these officers' supervisors regarding how the ACT officers were executing search warrants, and the opinions of current and former police officers regarding what constitutes proper training and procedure for the execution of search warrants and use of firearms. As the parties dispute the relevance of this information with regard to the legal standards necessary to show municipal liability, the court will address each party's interpretation of the facts in the context of the various showings plaintiffs must make to establish a genuine issue of material fact and preclude summary judgment.

1. Unlawful Custom or Practice in Executing Search Warrants

An official policy or custom within the meaning of *Monell* may be demonstrated by a pattern of conduct by municipal employees. *See McLin v. Chicago*, 742 F. Supp. 994 (N.D. Ill. 1990). To demonstrate that a pattern of conduct rises to the level of an official custom or policy, plaintiffs must show: (1) that a pattern of conduct exists; (2) that the custom or practice is attributable to the municipality; and (3) that the custom was the cause of the constitutional violation. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted).

a. Existence of Pattern of Conduct

Plaintiffs allege several incidents since 1985 that they claim establish the existence of a Seattle Police Department ACT custom or practice of unlawfully executing search warrants: (1) the first ACT unit, formed in 1985, routinely violated the knock and announce requirement during the execution of search warrant, Affidavit of Charles Pillon, ¶¶ 8-11; (2) officers forced the door open during most searches executed by the second ACT unit, Deposition of Robert Lisoski at 53 (door forced open in more than 50 percent of searches), Deposition of Officer Bailey at 66 (door forced open in 99 percent of searches); (3) on February 2, 1988, an unarmed man, William Tucker, was shot and killed by Officer Michael Henry during the execution of a search warrant when Officer Henry's gun discharged as he tried to establish position inside the door, *see* Affidavit of Todd Maybrown, Exhibit A, at 2 (statement of Michael Henry); (4) on February 4, 1988, two citizens of the South Seattle neighborhood in which William Tucker lived wrote a letter to Seattle City Council members expressing concern about what they considered the unwarranted nighttime execution of search warrants that often resulted in forceful entries into people's homes, *see id.*, Exhibit B, at 1; (5) on April 7, 1987, Officer Al Thompson accidentally discharged his weapon when he became tangled in a wire from a screen door that he and another officer had just forced open during the execution of a narcotics-related search warrant; (6) on October 17, 1987, during the nighttime execution of a search warrant, Officer Landy Black fired his weapon at a shirt hanging on a curtain rod, explaining afterward that in the darkness he thought the item he fired at was a tall person

lunging toward him, *see id.*, Exhibit D, at 1 (statement of Landy Black);[5] (7) a KIRO-TV news videotape of ACT II members executing two search warrants on February 6, 1988, showing officers breaking down the door without satisfying the knock and announce requirement, Affidavit of Charles Pillon, Appendix D; and (8) a February 9, 1988, letter from Mr. Pillon to Chief Fitzsimons expressing concern over incidents of officers discharging their guns during the execution of search warrants. Affidavit of Charles Pillon, Appendix C.

Defendants argue that these incidents do not establish a custom, practice or pattern of conduct. First, they argue that plaintiffs have listed too few incidents to establish a pattern of conduct. Second, they argue that the ACT officers were trained specifically in the requirements of the knock and announce statute. Affidavit of Diane Libby, Exhibit 1, Deposition of Michael R. Germann, at 51, 55. Third, they argue that the William Tucker shooting incident did not involve the knock and announce requirement at all because the officers had been invited into that residence. *Id.*, Exhibit 7, Excerpts from Transcript of Proceedings of Inquest re William Tucker, Volume I, at 66-68. Fourth, defendants argue that the KIRO videotape of searches executed on February 6, 1988, is an incomplete record of the knock and announce procedure, and that the officers executing those searches have stated that they were not routine, in part because they were disrupted by

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[5] These last two incidents were reported in a February 7, 1988, article in the *Seattle Times*. In the October 17, 1987, incident, two children slept on mattresses near the curtain rod at which the officer fired.

the camera crew. Deposition of Officer Barker, at 84-87; Deposition of Robert Lisoski, at 81. Finally, defendants argue that it is not a violation of rights to execute a search warrant at night or to execute multiple search warrants in the same evening.

The court finds that the multiple incidents identified by plaintiffs raise a genuine issue of material fact regarding whether the Seattle Police Department ACT officers engaged in an unconstitutional pattern of conduct in the execution of narcotics-related search warrants.

b. Custom or Practice Attributable to Municipality

For a custom or practice to be attributable to the municipality, plaintiffs must show that an individual with decision or policy-making authority had knowledge of the custom or practice. *See Bordanaro*, 871 F.2d at 1157. Constructive knowledge may be shown by "evidence of the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them." *Spell v. McDaniel*, 1880, 1887 (4th Cir.), *cert. denied* 108 S.Ct. 752 (1988) [sic].

Defendants do not dispute that Chief Fitzsimons is the city's official policymaker responsible for law enforcement decisions, including how search warrants are to be executed. Plaintiffs argue that Chief Fitzsimons had both actual and constructive knowledge of the custom or policy of unlawful execution of search warrants.

Plaintiffs argue that Chief Fitzsimons had actual knowledge from the letter sent to the Seattle City Council, from the KIRO videotape, which he states he has viewed, from the various memoranda and letters sent by Charles Pillon, and from comments made by Chief Fitzsimons after the death of William Tucker.[6] Plaintiffs argue that Chief Fitzsimons had constructive knowledge because the letters and the KIRO videotape indicate that the practice was "so widespread or flagrant" that Chief Fitzsimons, in the proper exercise of responsibilities, would have known of them.

Defendants argue that Chief Fitzsimons did not have actual knowledge of several of the incidents described by plaintiffs. For example, defendants argue that Chief Fitzsimons did not have knowledge of the February 4, 1988, letter sent to Seattle City Council members Jane Noland and Delores Sibonga. Affidavit of Diane Libby, Exhibit 4, at 12 (Deposition of Patrick Fitzsimons). Defendants further argue that Chief Fitzsimons did not have any information regarding problems with the second ACT, *id.* at 36-37, and that although Chief Fitzsimons was aware from Mr. Pillon of improprieties among the first ACT members, he took measures to investigate these

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[6] According to plaintiffs, after William Tucker was shot, Chief Fitzsimons stated, "It's a drug war and we're going to continue serving search warrants and going after the people who sell drugs." Affidavit of Charles Pillon, Appendix A. Chief Fitzsimons stated that this particular quote was taken out of context in a conversation regarding the duty of the Seattle Police Department to continue to try to arrest narcotics dealers. Affidavit of Diane Libby, Exhibit 4, at 44-46 (Deposition of Patrick Fitzsimons).

improprieties and expressed concerns about having Mr. Pillon follow proper procedures in the future. *Id.* at 16, 20. Defendants again urge the court to look at the manner in which Seattle Police Department officers were trained regarding the knock and announce requirement. Finally, defendants argue that the city cannot be held liable because the only *policy* attributable to the city was the decision to hold a training session for ACT members in December of 1987. *Id.*, Exhibit 12 (Affidavit of Dan Bryant). They state that it was always the clear policy of the city to be in compliance with applicable law. *Id.*, Exhibit 4, at 16.

The court again finds that there is a genuine issue of material fact that precludes summary judgment. Although Chief Fitzsimons states that he expected his officers to comply with the knock and announce requirement, plaintiffs have shown instances in which there was a question whether the officers complied with the knock and announce requirement. Plaintiffs also have shown that Chief Fitzimons was aware of several of these incidents. For example, Mr. Pillon wrote a letter *to Chief Fitzsimons* shortly after the Tucker shooting and prior to the Bascomb shooting expressing his concern with the practices of the second ACT.

c. Causal Link

To support liability under 42 U.S.C. § 1983, a municipal custom must be the "moving force" behind the plaintiff's injury. *Oklahoma City v. Tuttle*, 471 U.S. 808, 819 (1985). There must be some affirmative link between the municipal custom and the constitutional deprivation. *Id.*

at 824-25 n.8. Where officials fail to remedy continued unconstitutional misconduct, such misconduct can be presumed to facilitate similar unlawful actions in the future. *See Brandon v. Holt*, 469 U.S. 464, 467 (1985); *Parker v. District of Columbia*, 850 F.2d 708, 714 (D.C. Cir. 1988). However, where defendants can show that the particular custom or policy was not followed in the situation leading to a plaintiff's injury, there is no causal link between the municipal custom and the plaintiff's injury. *Cf. Bordanaro*, 871 F.2d at 1157.

Defendants argue that even if there was a general practice of not observing the knock and announce requirement, the ACT unit that executed the search warrant at the Bascomb apartment did observe the knock and announce requirement. They argue that, as a result, such a custom or practice was not the moving force behind Erdman Bascomb's death.

The court finds that plaintiffs have raised a genuine issue of material fact regarding whether defendants violated the knock and announce requirement in executing the Bascomb warrant, thereby providing an affirmative link between the alleged municipal custom and violation of Erdman Bascomb's rights. There is considerable conflicting evidence regarding how long the ACT team waited before forcing their way into the apartment after knocking and announcing their presence and whether in fact they actually knocked and announced their presence. The estimates of the police officers range from two to fifteen seconds. Some members of the inquest jury estimated that the entry occurred no more than four seconds

after the knock and announcement. *See* Plaintiffs' Memorandum Re: Qualified Immunity, at 12 n.4. Officer Lisoski himself estimated that the ACT members waited ten seconds before forcing the door open.

In short, plaintiffs have put forth evidence to show that factual issues remain on all three elements of their municipal liability claim that the city had a custom or practice of violating the knock and announce requirement.

2. Inadequate Training, Supervision and Discipline

Inadequate training may form the basis for municipal liability under 42 U.S.C. § 1983 only where the failure to adequately train amounts to deliberate indifference toward the rights of those with whom the police officers come into contact. *Canton v. Harris*, 489 U.S. 378 (1989). A need for action on the part of a municipality may be so obvious that failure to take action could be characterized as deliberate indifference to an individual's rights. *Id.* at 390; *McLin*, 742 F. Supp. at 1002.

In addressing this issue, the court must focus on the adequacy of the training in light of the particular tasks that the officers must perform. *Canton*, 489 U.S. at 390. To affix liability on the municipality, it is insufficient that a particular officer may be unsatisfactorily trained. *Id.* In addition, it is insufficient to show that the injury to plaintiff could have been avoided had the officer had more or better training. *Id.*

Plaintiffs have submitted the affidavits of Charles Pillon and Robert McBride which raise questions about

the adequacy of the firearm and search warrant execution training. Plaintiffs also point to the multiple occasions of firearms discharges that occurred during the execution of search warrants and to the KIRO videotape as evidence. *See Tennessee v. Garner*, 471 U.S. 1 (1985) (need to train officers in the constitutional limits of the use of deadly force is so obvious that failure to do so may be characterized as deliberate indifference).

Defendants argue, on the other hand, that the Seattle Police Department adequately trained all ACT officers both in the use of firearms and in the execution of search warrants, including the knock and announce requirement. They point specifically to the December 1987 training session for ACT members during which officers discussed pre-raid planning and practiced execution of a search warrant on an abandoned building. Affidavit of Diane Libby, Exhibit 12 (Affidavit of Dan Bryant). Defendants further argue that after each of the incidents described by plaintiffs, the Seattle Police Department reviewed the incidents, and, on one occasion implemented a suggestion that the officer involved be required to undergo additional training. *See* Defendants' Reply Brief on Motion for Summary Judgment at 5. Finally, defendants state that there was no policy of inadequate discipline or supervision because it was Chief Fitzsimons' policy and the policy of the Seattle Police Department to emphasize to all officers that they should follow all rules and regulations including the knock and announce requirement. Affidavit of Diane Libby. Exhibit 2, Deposition of Michael Germann, at 75-78.

The court finds that plaintiffs have raised a genuine issue of material fact regarding whether defendants'

inadequately trained, supervised and disciplined ACT officers regarding the execution of search warrants and use of firearms and regarding whether such inadequate training amounted to deliberate indifference to Erdman Bascomb's rights. Finally, the court finds that as with plaintiffs' claim that defendants had an official custom of unlawful execution of search warrants, plaintiffs have raised a genuine issue of material fact regarding whether the inadequate training was attributable to the municipality and whether it was the moving force behind deprivation of Erdman Bascomb's rights. *See supra,* Part C(1)(b), (c).

As genuine issues of material fact remain regarding each of plaintiffs' claims for municipal liability, defendants' motion for summary judgment will be denied.

E. Liability of Chief Patrick Fitzsimons

Chief Fitzsimons is sued both in his individual and in his official capacity. A suit against an individual in his official capacity is to be treated as a suit against the governmental entity. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). As the law governing municipal liability also governs the liability of an individual sued in his official capacity, the court need not revisit that issue. *See Hutton v. Strickland,* 919 F.2d 1531, 1543 (11th Cir. 1990).

Although there is no liability under 42 U.S.C. § 1983 based on respondeat superior, *Rizzo v. Goode,* 423 U.S. 362, 377 (1976), a government official is liable in his individual capacity if the official plays an affirmative role in the constitutional violations. *See Andrews v. City of*

Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). In addition, a supervisor may be liable for the acts of those he supervises if he has done something, or failed to do something that he should have done, that was a proximate cause of the violation of an individual's rights. *See Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978); *Bowen v. Wadkins*, 669 F.2d 979, 986-89 (5th Cir. 1982).

Defendants argue that Chief Fitzsimons cannot be held liable in his individual capacity for two reasons. First, they argue that Chief Fitzsimons is entitled to qualified immunity because a reasonable police chief in his situation would have reasonably believed that the decisions he made were lawful and proper. Second, they argue that plaintiffs have not shown that Chief Fitzsimons was directly involved in or participated in the incidents described by plaintiffs and alleged to have lead to the deprivation of Erdman Bascomb's rights.

1. Qualified Immunity

As defendants raise the qualified immunity issue for the first time in their reply memorandum, the court is not required to address it. However, the court is also convinced that Chief Fitzsimons is not entitled to such immunity. As discussed above, Erdman Bascomb's constitutional right against use of excessive force was clearly established at the time of his death. As with Officer Lisoski's motion for qualified immunity, the reasonableness of Chief Fitzsimons' actions must be left to the jury.

2. Chief Fitzsimons' Involvement in Deprivation of Erdman Bascomb's Rights

Other courts have ruled that chiefs of police have a duty of supervision to correct misconduct of which they have notice. *See, e.g., McClelland v. Facteau,* 610 F.2d 693, 697 (10th Cir. 1979). To establish such supervisory liability, plaintiffs must establish that the supervisor's conduct amounted to deliberate indifference to the constitutional rights of those with whom they come into contact. *Gutierrez-Rodriquez v. Cartagena,* 882 F.2d 553, 562 (1st Cir. 1989). Plaintiffs allege that Chief Fitzsimons played an affirmative role in deprivation of Erdman Bascomb's rights because although he had notice of the misconduct of the ACT members, he did not address the problem by directing additional training or discipline. Plaintiffs further allege that this failure to act amounted to deliberate indifference because Chief Fitzsimons knew, or should have known, that continuation of this misconduct would result in deprivation of constitutional rights.

The court already has addressed at some length the evidence introduced by plaintiffs to demonstrate that Chief Fitzsimons had either actual or constructive knowledge of the activities of the ACT unit members during the execution of search warrants. Plaintiffs here particularly emphasize that Chief Fitzsimons received the letter from Charles Pillon only days after William Tucker was shot and days before Erdman Bascomb was shot. The information presented by plaintiffs is sufficient to establish a genuine issue of material fact regarding whether Chief Fitzsimons exercised his duty of supervision in light of the activities of the ACT members and whether Chief

Fitzsimons alleged failure to adequately supervise deprived Erdman Bascomb of his rights. Accordingly, defendants motion for summary judgment of dismissal of the claim against Chief Fitzsimons in his individual capacity will be denied.

F. Plaintiffs' Motion for Summary Judgment on Affirmative Defenses Nos. 3-6

In their answer to plaintiffs' complaint, defendants asserted six affirmative defenses, including violation of the statute of limitations (No. 3), failure to comply with conditions precedent to filing suit (No. 4), insufficient service of process (No. 5), and self defense (No. 6). Plaintiffs sought to compel from defendants responses to interrogatories seeking to discover the facts upon which these affirmative defenses rest.

This court declined to compel answers to these interrogatories but instructed defendants to notify the court as well as plaintiffs which of these defenses they intended to pursue. In a November 20, 1991, supplemental response to interrogatories, defendants stated that they intended to pursue all of their affirmative defenses at trial or on appeal. Defendants declined to respond to a subsequent letter from plaintiffs requesting that defendants identify which defenses they intended to pursue *at trial*. *See* Affidavit of Todd Maybrown in Support of Plaintiffs' Motion for Partial Summary Judgment Re: Asserted Defenses, Attachment A, B. Plaintiffs now move for summary judgment of dismissal of defendants' third, fourth, fifth and sixth affirmative defenses.

1. Statute of Limitations Defense

Defendants concede that Plaintiffs' initial complaint dated January 1991 was filed within the three-year statute of limitations applicable to plaintiffs' claims. Nonetheless, defendants argue that their statute of limitations claim should not be dismissed for three reasons. First, they state that they intend to pursue this issue on appeal based on this court's order permitting plaintiffs to amend their complaint to add Erdman Bascomb's parents as plaintiffs.[7] Second, they express concern about plaintiffs' motion to amend their complaint again to add Erdman Bascomb's daughter as a plaintiff.[8] Third, they argue that their statute of limitations defense is necessary should they prevail on their failure to comply with conditions precedent defense. Defendants apparently contend that if the court finds that plaintiffs have failed to properly file a notice of claim for damages with the city as mandated by a city ordinance, plaintiffs may seek to file a proper notice of claim and then bring another action in federal court within sixty days. Defendants contend that any subsequent notice of claim and lawsuit would be well beyond the three-year statute of limitations in this case.

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[7] This court held that although plaintiffs' formal motion to amend came beyond the three-year period, defendants had been on notice for some period of time that plaintiffs would be amending the complaint to add Erdman Bascomb's parents. The court also held that the amendment related back to the original complaint.

[8] Plaintiffs' motion to amend is addressed in a separate order.

These arguments are without merit. This court's prior order granting plaintiffs' motion to amend their complaint to add Erdman Bascomb's parents resolved any statute of limitations issue with respect to Paul, Frank or Flora Bascomb. A grant of summary judgment on this issue will not affect defendants' rights on appeal. Second, the fact that the court may again have to address the statute of limitations issue with respect to plaintiffs' motion to amend the complaint to add Erdman Bascomb's daughter, Ria Shar Caldwell, as a plaintiff, does not preclude the court from determining that the issue is moot with respect to the plaintiffs currently before the court. Third, as discussed below, there is no merit to defendants' failure to comply with conditions precedent defense.

2. Failure to Comply with Conditions Precedent

Seattle Municipal Code 524005 provides that no motion may be commenced against the city for damages until a written notice of claim has been presented to the city comptroller. Under the Seattle City Charter, the claim must be brought within six months of the incident prompting the claim. In addition, the claim must name the claimant and be signed by the claimant or an authorized representative. On July 15, 1988, Paul Bascomb submitted a claim for damages stating that he "will be the personal representative of Erdman Bascomb's estate." Affidavit of Todd Maybrown in Support of Plaintiffs' Motion for Partial Summary Judgment Re: Asserted

Defenses, Exhibit C. Paul Bascomb was named administrator of Erdman Bascomb's estate on November 20, 1990. *Id.*, Exhibit A.

Defendants argue that because only the personal representative of an individual's estate can bring a claim for wrongful death under Washington law, RCW 4.16.080, only the personal representative may be the proper claimant in a wrongful death action under Seattle Municipal Code 524005. Defendants conclude that because Paul Bascomb had not officially been named representative of his brother's estate at the time the notice of claim was filed with the city comptroller, the notice of claim is deficient and plaintiffs have failed to comply with a condition precedent to filing suit. Defendants also point out that Frank and Flora Bascomb were not listed as claimants at all on the notice of claim.

The court notes initially that this defense would have application only with respect to plaintiffs' state wrongful death claim against the city itself and would have absolutely no application to any of plaintiffs' federal civil rights claims or to plaintiffs' claims against individual officers. Failure to comply with state or municipal notice of claims statutes cannot be used to preclude federal civil rights actions. *Felder v. Casey*, 487 U.S. 131, 152-53 (1988) (holding that Wisconsin notice of claim statute is preempted by 42 U.S.C. § 1983). Second, as plaintiffs bring their state wrongful death claim only against Officer Lisoski individually and not against the city, any failure to comply with the claims statute is immaterial to plaintiffs' claims.

Finally, even if this court were to conclude that the Seattle notice of claims ordinance applied to plaintiffs' claims, this court concludes as a matter of law that the claim timely filed by Paul Bascomb on July 15, 1988, sufficiently put the city on notice of plaintiffs' claims against it. Washington courts traditionally have liberally construed state and municipal notice of claims provisions. *See Frasier v. Cowlitz County*, 67 Wash. 312, 314 2(1912). The purpose of a notice of claims ordinance is to permit the city to "investigate the claim and the claimant while the occurrence is recent and evidence available . . . " *Id.* at 314. The claim filed by Paul Bascomb on July 15, 1988, made the city award of the incident for which he had a claim and set forth his claim for damages for "loss of life, earnings, *companionship to parents*, pain and suffering, funeral expenses, and other consequential damages." Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Appendix A. In addition, Paul Bascomb stated that he was making his claim as the personal representative of Erdman Bascomb's estate. Thus, defendants clearly were on notice both that Paul Bascomb claimed to be the personal representative for his brother's estate and that it faced a potential claim for liability by Erdman Bascomb's parents.

Accordingly, this court determines that plaintiffs have complied with the Seattle notice of claims ordinance and that plaintiffs are entitled to summary judgment of dismissal of defendants' fourth affirmative defense, failure to comply with a condition precedent.

3. Service of Process

Defendants argue that plaintiffs have failed to properly serve defendant Jane Doe Lisoski or the Lisoski marital community because they have not even attempted service on Officer Lisoski's wife and because they served Officer Lisoski at his place of employment rather than at his home. Defendants concede that Officer Lisoski was served at the South Precinct for the Seattle Police Department on January 28, 1991.

Defendants' service of process argument is without merit. Plaintiffs have named Jane Doe Lisoski as a defendant solely for the purpose of obtaining a judgment against the Lisoski marital community. Under Washington law, service of process on either spouse is sufficient to support a judgment on a community obligation. *See, e.g., Oil Heat Co. of Port Angeles, Inc. v. Sweeney,* 26 Wn.App. 351, 356 (1980). Defendants present no authority to the contrary. Accordingly, plaintiffs' motion for summary judgment of dismissal of defendants' fifth affirmative defense will be granted.

4. Self Defense

Defendants argue that self defense is an affirmative defense to plaintiffs' pendent wrongful death claim under Washington law and must be specifically plead. *See* RCW9A.16.020, *et seq.*; Fed. R. Civ. P. 8(c). Defendants do not assert self defense with respect to any of plaintiffs' federal civil rights claims. Plaintiffs argue, however, that self defense is not a defense to a negligence claim. *See generally* 65A C.J.S. Negligence § 181 (discussion of

proper defenses to a negligence claim does not include self defense). Plaintiffs also suggest that Washington courts recognize only two affirmative defenses to a negligence claim, assumption of risk and comparative negligence. *See, e.g., Kirk v. Washington State University*, 109 Wn.2d 448 (1987); *see also Taylor v. Burlington Northern Railroad Co.*, 787 F.2d 1309, 1316-17 (9th Cir. 1986).

This court agrees that self defense is not a valid defense in this context. RCW 9A.16.020, *et seq.*, discusses self defense and justifiable killing only in the context of criminal cases. None of the cases annotated at the end of the statute discuss use of self defense as a defense in a negligence action. Accordingly, the court concludes as a matter of law that self defense is not an affirmative defense available to defendants on plaintiffs' state wrongful death claims and will grant plaintiffs' motion for summary judgment of dismissal of defendants' sixth affirmative defense.

III. CONCLUSION

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) defendants' motion to strike the affidavits of Carol Murren and Robert McBride is DENIED:

(2) defendants' motion for summary judgment on the issue of the qualified immunity of Officer Robert Lisoski is GRANTED only with respect to plaintiffs' claim based on violation of the knock and announce statute, 18 U.S.C. § 3109;

(3) defendants' motion for summary judgment on the issue of the qualified immunity of Officer Robert Lisoski is DENIED with respect to plaintiffs' Fourth Amendment claim based on Erdman Bascomb's right to be free from an unreasonable seizure;

(4) plaintiffs' motion for summary judgment of dismissal of Officer Lisoski's qualified immunity defense is GRANTED only with respect to their Fourth Amendment claim based on Erdman Bascomb's right to be free from an unreasonable seizure;

(5) defendants' motion for summary judgment of plaintiffs' municipal liability claim under 42 U.S.C. § 1983 is DENIED;

(6) defendants' motion for summary judgment of dismissal of the claims against Chief Patrick Fitzsimons is DENIED; and

(7) plaintiffs' motion for summary judgment of dismissal of defendants' third, fourth, fifth and sixth affirmative defenses is GRANTED.

DATED at Seattle, Washington this 23rd day of April, 1992.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX G

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb; FRANK BASCOMB, SR.; FLORA O. BASCOMB, Plaintiffs-Appellees, v. CITY OF SEATTLE; POLICE CHIEF PATRICK S. FITZSIMONS AND JANE DOE FITZSIMONS, and their marital community; ROBERT LISOSKI and JANE DOE LISOSKI, and their marital community, Defendants-Appellants.	No. 92-35436 D.C. No. CV-91-51-BJR (Western Washington) ORDER (Filed Jan. 19, 1994)

Before: GOODWIN, SCHROEDER and PREGERSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX H

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-35436
CT/AG#:CV-91-51-BJR

PAUL A BASCOMB, as Personal Representative of the Estate of Erdman Bascomb; FRANK BASCOMB, SR.; FLORA O. BASCOMB

Plaintiffs – Appellees

v.

CITY OF SEATTLE; POLICE CHIEF PATRICK S. FITZSIMONS AND JANE DOE FITZSIMONS, and their marital community; ROBERT LISOSKI and JANE DOE LISOSKI, and their marital community

Defendants – Appellants

(Filed Jan. 29, 1994)

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered October 28, 1993.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb; FRANK BASCOMB, SR.; FLORA O. BASCOMB, Plaintiffs-Appellees, vs. CITY OF SEATTLE; POLICE CHIEF PATRICK S. FITZSIMONS and JANE DOE FITZSIMONS, and their marital community; ROBERT LISOSKI and JANE DOE LISOSKI, and their marital community, Defendants-Appellants.	NO. 92-35436 APPELLANTS' MOTION TO SUPPLEMENT THE RECORD PURSUANT TO FRAP 10(e)

COME NOW appellants Officer Robert Lisoski and Chief Patrick Fitzsimons and hereby respectfully request the court supplement the record on appeal by inclusion of the attached information from the deposition of plaintiffs' purported expert, Carol Murren. This motion is based upon FRAP 10(e).

This motion to supplement the record has only become necessary because of this court's memorandum opinion dated October 28, 1993 wherein it affirmed the trial court's denial of a qualified immunity summary judgment motion on the basis that a question of fact existed as to the position of Bascomb's body at the time

Officer Lisoski fired. (Memorandum opinion at 2-3). The trial court noted the different opinions as to whether Bascomb turned, but did not consider this to be a material issue of fact (order re: pending motions on liability issues. (CR 156; ER 314, 329, p. 16, n. 4).

Because the trial court did not consider the position of the body a material issue of fact, appellants did not argue the matter on appeal and did not submit the deposition testimony of Carol Murren, which is contradictory to her affidavit and wherein she retracts her affidavit statement relied upon by this court in its memorandum opinion. (*See,* Memorandum opinion at 3). This court seems to have created a new material issue of fact (which in fact is not material). Carol Murren's retraction of the affidavit statement that Bascomb was turning away from the officer, and admission that she does not know Bascomb's body position becomes necessary for the first time.

As indicated in the attached affidavit of Thomas D. Frey, discovery directed to the Bascombs' requested disclosure of experts. In the plaintiffs' response to the February 1991 discovery requests, made in May 1991, Carol Murren was not disclosed as an expert witness (or as a key witness). In the Bascombs' first supplemental responses of October 1991, Carol Murren was again not disclosed. In the Bascombs' second supplemental responses to discovery of December 1991, again Carol Murren was not disclosed. However, her affidavit was signed on January 13, 1992, (CR 64; ER 100) after the summary judgment motion had been filed. (CR 41; ER 8). On January 21, 1992, appellants Lisoski and Fitzsimons moved to strike the Murren affidavit. (CR 68; ER 119).

In her opinion, the trial court did not consider the position in which Bascomb's body was moving to be a material issue of fact. (Order at 16; ER 329). The trial court did note that there was a difference of opinion between the testimony of Robert Lisoski, Dr. Corinne L. Fligner, the pathologist who performed the autopsy, and that of Carol Murren, plaintiffs' expert. (Order at 16, n. 4; ER 329. In her deposition testimony taken on March 16, 1992, however, at the first opportunity after her existence was first disclosed by receipt of her affidavit, Carol Murren retracted her statement that Bascomb's body was turning away from the officer. (Murren Deposition at 36-37, Affidavit of Thomas D. Frey). This appears to be the statement relied upon by this court to create an issue of fact.

It is therefore necessary for this court to consider the supplemental information of this retraction. This information could not have been considered by the trial court since it was not and could not have been discovered prior to the motion for summary judgment as the existence of Carol Murren as an expert witness was not disclosed prior to the motion for summary judgment. *See, Daly-Murphy v. Winston,* 837 F.2d 348, 351 (9th Cir. 1987). Further, the trial court did not consider the matter a material dispute (Order at 16; ER 329).

Appellants Lisoski and Fitzsimons therefore respectfully request this court, as part of its consideration of the motion for reconsideration, and in the exercise of its discretion uder [sic] FRAP 10(e), to review the three pages of deposition testimony from Carol Murren, which

retracts her affidavit statement, and to allow this supplementation of the record on appeal, under these unusual circumstances.

RESPECTFULLY SUBMITTED this 10th day of November, 1993.

STAFFORD FREY COOPER &
STEWART

/s/ Stephen P. Larson
STEPHEN P. LARSON, WSBA #4959
THOMAS D. FREY, WSBA #1908
Of Attorneys for Appellants
Lisoski & Fitzsimons

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb; FRANK BASCOMB, SR.; FLORA O. BASCOMB, Plaintiffs-Appellees, vs. CITY OF SEATTLE; POLICE CHIEF PATRICK S. FITZSIMONS and JANE DOE FITZSIMONS, and their marital community; ROBERT LISOSKI and JANE DOE LISOSKI, and their marital community, Defendants-Appellants.	NO. 92-35436 AFFIDAVIT OF THOMAS D. FREY

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Thomas D. Frey being first duly sworn upon oath deposes and says:

1. I am one of the attorneys of record for the defendants/appellants Lisoski and Fitzsimons. I am familiar with the record below and the discovery proceedings that went on prior to defendants/appellants' motion for summary judgment.

2. In February 1991, defendants/appellants submitted discovery requests to the plaintiffs, including requests to disclose experts. When those discovery requests were responded to by the plaintiffs in May 1991, Carol Murren was not disclosed in any form whatsoever, and particularly as an expert.

3. In October 1991 plaintiffs submitted their first supplemental responses to the discovery requests, and again Carol Murren was not disclosed as a witness, expert or otherwise.

4. In December 1991 plaintiffs submitted their second supplemental responses to discovery requests and again Carol Murren was not disclosed as an expert witness or witness of any kind.

5. The first time that defendants/appellants Lisoski and Fitzsimons became aware of the existence of Carol Murren as a potential expert witness was when we received her affidavit dated January 13, 1992 which was filed as part of plaintiffs' response to the defense motion for summary judgment. Defendants/appellants immediately filed a motion to strike Carol Murren's affidavit on January 21, 1992.

6. On March 16, 1992 I took the deposition of Carol Murren. Attached hereto and incorporated herein are pages 35 through 37 and 46 and 47 of the transcript of that deposition wherein she retracts her statement contained in her affidavit of January 13, 1992 that Bascomb's body was turned away from the officer at the time he fired. In fact, she states that that was in error and that she has no basis for concluding that Bascomb was turned away from Officer Lisoski at the time the officer fired. She

does not have any idea of Mr. Bascomb's movements or body movements or the position of his body at the time. At page 37 she states: "that as far as turning, I don't have anything to base movement during the time in one way or the other."

/s/ Thomas D. Frey
Thomas D. Frey

SUBSCRIBED AND SWORN to before me this 10th day of November, 1993.

/s/ Stephen P. Larson
NOTARY PUBLIC in and for the State of Washington, residing at Bainbridge Island
My Commission Expires: 1/17/95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL E. BASCOM, et al.,)
Plaintiffs,)
vs.) NO. C91-51R
THE CITY OF SEATTLE,)
Defendant.)

DEPOSITION UPON ORAL EXAMINATION OF
CAROL MURREN

10:20 o'clock a.m.

March 16, 1992

500 Watermark Tower

Seattle, Washington

SHERRI DEWITT
COURT REPORTER

* * *

[p. 35] Q Is that your understanding?

A Turned toward the back of the couch, is that what you are referring to?

Q Let me rephrase my question. Assuming Mr. Bascom [sic] is on the loveseat at B on Exhibit No. , whatever that is, 2?

A 2.

Q – 2, and assuming that he is laying towards his left side, towards the wall that is immediately in back of that couch as depicted in Exhibit 1. If he is turning towards the officer, moving his leg down off the edge of that couch and moving his hand up, would that be consistent with what the officer said?

A That is possible if he is in the process of turning toward from a turned away position. But that's different than being turned toward the officer.

Q Okay. Now, in your testimony, which you've given by way of an affidavit, you indicate that it was your opinion that Mr. Bascom [sic] was turning away from the officer at the time he fired; is that correct?

A I don't believe I said turning away. I believe I said that his body was turned away slightly.

(Brief pause in the proceedings.)

[p. 36] A Oh, I do say turning his body away.

Q Okay. What do you have as a basis for making the determination that he was turning his body away at the time?

A I am afraid I don't. I should have said his body was turned slightly away.

Q So, in order for the officer's testimony to be consistent with the wound, according to your testimony, if Mr. Bascom [sic] was laying somewhat to his left side, that is, towards the wall in back of the couch, and as the officer viewed him, he started to move his right leg and raise his right arm, turning away from that wall somewhat, that would be consistent with your view of the autopsy report and the Exhibit No. 3 drawing of Doctor Fligner; is that correct?

A Yes, if he were still slightly turned away, but in the movement of turning his body, I believe that that could occur.

Q You don't have any idea what Mr. Bascom's [sic] movements or body movements were, or the position of his body, other than what the officer testified to as to what he thought he saw, that is, the leg movement and the arm movement; is that correct? You read that?

[p. 37] A And the trajectory.

Q And the trajectory.

A That's the only information that I have, yes.

Q All right. Now, why would you say in your affidavit that it was your opinion he was turning his body away from Officer Lisoski at the time he was shot?

A It was apparently an oversight on my part. I should have said his body was turned away.

Q Okay.

A But as far as turning, I don't have anything to base movement during the time in one way or the other.

Q And you don't know what Mr. Bascom [sic] was doing as he was sitting on that couch when he saw the officer and put his leg and raised his arm up like that, do you?

A I don't know even that he raised his arm and raised his leg. I don't know what he was doing, no.

Q So you are not sure what the dynamics of his body was, or what he was going through at the moment that the officer fired; is that correct?

A I only know the orientation that the bullet entered the body.

* * *

[p. 46] Bascom [sic] is not turned away from the couch, is not turned towards the officer.

Q Is the entry wound consistent with Mr. Bascom [sic] raising, moving his leg like this (indicating), and demonstrating for the record, raising his arm up and getting up off the couch?

A Again, if his body is turned slightly away at that point, then it could be. But if –

Q Have you measured –

MR. MAYBROWN: Wait, wait. I don't think she's finished her answer.

MR. FREY: Pardon me. I'm sorry. I thought you had.

A But if he's just raising up this way (indicating), no, then that's not sufficient.

Q Okay. Would there be any twisting of his body as he were raising his arm if he were sitting up?

A It's impossible to tell without knowing the original position.

Q Your explanation for that is if Officer Lisoski is correct in Exhibit 3 as to where he was standing, that Mr. Bascom [sic] was turning away from the officer at the time that he fired; is that correct?

A My testimony is that Mr. Bascom [sic] was slightly turned away from the officer at the time he fired.

[p. 47] I am sorry that I ever said turning away, because that indicates movement at the time, and I have no way of knowing that.

Q Is the channel changer being on the floor near the end of the couch consistent with what the officer said?

A It could be.

Q Okay. It wasn't found on the couch, as far as you know; is that correct?

A I don't know where it was found. I know that the body –

Q Do you know if it was moved?

A No, but I know that the body was moved, other things could have been moved at the same time.

Q Okay. So we don't know where the channel changer was?

A I'm not – I don't know where the channel changer was.

Q But assuming that it was on the floor near the end of the couch, that would be consistent them [sic] with the officer's testimony that he had raised his arm up and had a channel changer in it, assuming that he dropped it when he was shot?

A It could be, yes.

Q Have you done any types of experiments at all,

* * *